IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 260

LURA D. GLASSEY and HENRY L. BROENING,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

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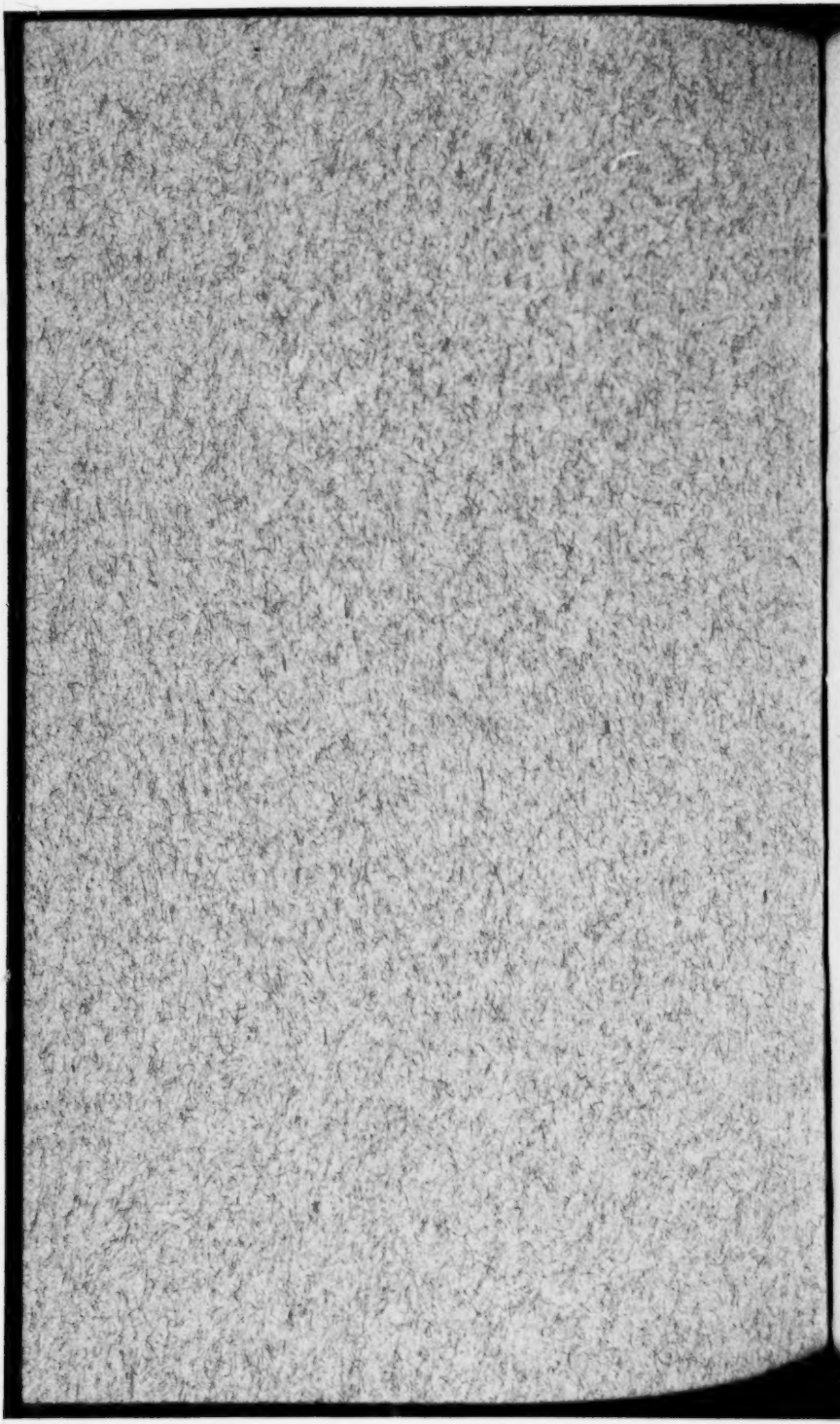

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Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

This petition for a writ of certiorari seeks a review of a decision of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. That court considered the effect of Subdivision (H) of Section 47.50 (the "anti-nudism" ordinance) of the Los Angeles Municipal Code on the rights of the petitioners in the light of the basic liberties guaranteed by the Fourteenth Amendment to the United States Constitution [Tr. 119-120; R.....].[1] On the basis

[1]The Record as of the date of the printing of this petition is being printed by the clerk of this court and is not yet available. References to the Record, therefore, are to the typewritten transcript certified to this court by the clerk of the Appellate Department of the Superior Court, in and for the County of Los Angeles, and are denoted "Tr." followed by the page number.

of this consideration the Appellate Department found that the ordinance in question did not unduly restrict those personal liberties and that it was therefore not violative of federal constitutional right. The court accordingly affirmed the judgment of the trial court. The judgment of the trial court [Tr. 68; R. .....] and the Memo Opinion of the Appellate Department [Tr. 103; R. .....] are not reported.

Jurisdiction.

The final judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, was entered May 5, 1947 [Tr. 104; R. .....]; and petition for rehearing was denied on May 12, 1947 [Tr. 115; R. .....]. Said court is the highest court in the State of California to which petitioners under the law of that state might appeal their case.[2] The issue as to which petitioners seek this court's review involving the constitutionality of Subdivision (H) of Section 47.50 of the Los Angeles Municipal Code under the Fourteenth Amendment to the United States Constitution, was decided adversely to petitioners, over their argument, by the state court [Tr. 103; R. .....]. The jurisdiction of this court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C. 344 (b)).

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[2]California Constitution, Art. VI, Secs. 4, 4b and 5;

California Penal Code, Secs. 1466-1470;

Cf. Young v. California, 308 U. S. 147, 154, and *Herbold v. A. T. & S. F.*, 117 Cal. App. 430.

Questions Presented.

1. Does Subdivision (H) of Section 47.50 of the Los Angeles Municipal Code which prevents the operation of any place where Nudism may be practiced, on its face and as applied to petitioners herein, unconstitutionally restrict petitioners' personal liberty without due process of law within the meaning of Section 1 of the Fourteenth Amendment to the United States Constitution?

2. Does the practice of Nudism pursuant to a sincere belief in the principles of Nudism where there is no showing of obscene or immoral conduct constitute an exercise of freedom of speech, within the guarantees of the Fourteenth Amendment?

Statutes Involved.

Subdivision (H) of Section 47.50 of the Los Angeles Municipal Code[3] provides:

> It shall be unlawful for any person to operate, manage, or conduct any camp, colony, or other place of resort, wherein three or more persons not all of the same sex are permitted or allowed to commingle in the nude; or wherein persons are permitted or allowed to view persons of the opposite sex in the nude.

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[3]The Los Angeles Municipal Code is Ordinance 77,000 of the City of Los Angeles. The entire text of Section 47.50 is hereinafter set forth as Appendix "A."

Statement of the Case.

FACTS—On August 31, 1946, petitioners were arrested when police officers of the City of Los Angeles went to the premises involved and posed as believers in Nudism [Tr. 76; R. .....]. The officers were admitted only after they employed subterfuge and professed agreement with the principles of Nudism by signing a Registration Form with the fictitious names of "Mr. and Mrs. Robert and Anna Bond" [Tr. 76; R. .....]. The agreement signed by the police officers is the same one all who desire entrance must agree to and is People's Exhibit "A." It is hereinafter set forth as Appendix "B."

The premises here involved are located at 9804 La Tuna Canyon in Los Angeles County, California [Tr. 76; R. .....], about one mile away from the highway [Tr. 79; R. .....]; they are surrounded on three sides by high hills and there is no habitation on any of the hills [Tr. 80; R. .....]; the entrance to the premises is removed from any visible habitation [Tr. 80; R. .....]. The premises are run by the Fraternity Elysia [Tr. 79; R. .....], an organization the members of which believe in the practice of Nudism [Tr. 79; R. .....]. They believe that great moral and health benefits are to be derived from the practice of Nudism [Tr. 81; R. .....]; that their purpose in being in the nude is not to expose themselves to others but to get the benefits of Nudism [Tr. 81; R. .....].

At the time petitioners were arrested there were men, women and children on the premises—some of whom were in the nude [Tr. 77; R. .....], some of whom wore

"G-straps" [Tr. 78, 79; R. .....], some of whom wore shorts [Tr. 76; R. .....], and some of whom were fully clothed [Tr. 77, 79; R. .....]. The activity that was going on consisted of: A lady taking care of the office [Tr. 77; R. .....]; two men playing on the badminton court [Tr. 77; R. .....]; a girl sitting on the back porch of one of the buildings [Tr. 77; R. .....]; three men and one woman walking toward the swimming pool [Tr. 77; R. .....]; one woman walking toward a cabin [Tr. 79; R. .....]; three men and one woman sunning themselves [Tr. 77, 79; R. .....]; a boy about 9 years old in the swimming pool [Tr. 80; R. .....]; two other children nearby [Tr. 80; R. .....]; and two or three men were in the game room [Tr. 79; R. .....].

Decisions Below—The trial court (Municipal Court of the City of Los Angeles) did not render an opinion. After a verdict of guilty by a jury [Tr. 67; R. .....], the trial court sentenced petitioner Glassey to 180 days in the Los Angeles City Jail [Tr. 69; R. .....] and petitioner Broening to 90 days in the Los Angeles City Jail [Tr. 68; R. .....].

The Appellate Department of the Superior Court affirmed the judgment of the trial court and on the constitutional issues here involved said: "We do not find subdivision (H) to be invalid either for uncertainty or as unduly restricting personal liberty" [Tr. 104; R. .....]. Further execution of sentence was stayed by the Appellate Department on July 23, 1947, pending disposition by this court of this petition.

Reasons for Granting the Writ.

1. This court has not passed upon, and a decision of the highest court of the land is needed to settle, the issue as to whether or not in our society, as today constituted, persons who are sincere in their belief in Nudism and who commit no anti-social or immoral acts may be prohibited by a municipality from practicing Nudism pursuant to their sincere belief.

All will agree that our nation is great because it affords to all persons the maximum freedom of personal liberty consistent with the protection by society from those activities which are harmful to it. Always there is the question in determining how far personal liberties shall be permitted to operate as to where "the other fellow's nose begins." Nudism is an idea in which many persons believe. It is also an idea by reason of the belief in which many persons are being put in jail—not because they are committing unlawful acts but because they are practicing Nudism. This court should, therefore, pass upon the question as to whether Nudism itself, with nothing more, should not be permitted to live or whether it is of such a nature as to permit of its demise. In other words, does not our society, as exemplified by the constitutional guarantees, protect a person in his belief that good health and high morals may be achieved in the practice of going about without clothes at such times and places where others will not be offended? At least is this not a right where no illegal or immoral acts occur? Constitutionally stated, does not the concept of the "clear and present danger rule"

protect this phase of living where, as here, there is no evidence of promiscuity or immorality?

The many persons who believe in Nudism constitute a minority whose rights are entitled to this court's protection just as are the rights of other minorities in other fields of human conduct. They are entitled, therefore, to a consideration by this court of those rights.

2. This court has given broad expression to the doctrine of the "clear and present danger rule" as being a "working principle[4] to determine "where the individual's freedom ends and the State's power begins."[5] But those cases have involved the exercise of expression through the medium of the tongue or pen. This court has never passed upon the question as to whether or not that rule also applies to freedom of expression through the medium of action. That is whether or not there is also, within the framework of the constitutional principle evolved, the right to practice one's social, economic or political belief as well as to give oral or written notice of it.

The case at bar is the case which gives this court the opportunity to pass upon that fundamental issue. The writ, therefore, should issue.

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[4]*Bridges v. California*, 314 U. S. 252, 263.

[5]*Thomas v. Collins*, 323 U. S. 516, 529.

ARGUMENT.

I.

Nudism Is a Social Belief Which, Like Any Other Social, Economic or Religious Belief, Can Be Proscribed Only if the Practice of the Belief Violates the "Clear and Present Danger" Rule.

A. Unless a Practice Involving Social Beliefs or a Course of Conduct Is Anti-social, or Against Public Peace of Good Order, the State Cannot Restrict the Exercise of the Personal Liberty to Practice That Belief.

It is the genius of our constitutional system of government that we start with the proposition that all persons living under the protection of that Constitution are free to act as they will so long as that action does not interfere with the right of society to protect itself from detrimental acts.

In the matter of the advocacy of particular beliefs through the medium of speech or assembly this rule has been expressed by this court as the "clear and present danger rule."[6]

But this right to act so long as one's actions are not anti-social or against the peace or good order of the community is not confined to matters or opinions concerning economic or political or religious beliefs. It extends to all matters of social belief. Particularly is this true with regard to matters concerning the "privacies of life."[7]

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[6] *Thomas v. Collins,* 323 U. S. 516;
Bridges v. California, 314 U. S. 252.

[7] *Weeks v. United States,* 232 U. S. 383, 390;
Entick v. Carrington, 19 How. St. Tr. 1029;
Cf. United States v. Leftowitz, 285 U. S. 452, 466.

In the case at bar it must be clearly borne in mind that the practice of Nudism itself is sought to be prohibited by the statute. There is nothing to indicate that any anti-social or immoral acts took place or that there was any clear or present danger that they would take place. It is purely and simply an attempt on the part of the City of Los Angeles to prevent these petitioners and others of like belief to practice their belief, the sincerity of which was never questioned. There is no attempt on the part of petitioners to force their beliefs upon others, nor to practice their beliefs in public or even where those who are not like minded would view the practice or be offended by it. Thus the record shows that the premises were far away from any habitation or public place [Tr. 79; R. .....]; it was a secluded spot, entrance to which was only permissible to those who were sincere believers in Nudism [Tr. 76; R. .....]. And nowhere in the record is there the slightest hint that any but normal healthful and moral pursuits were being carried on.

The beliefs which the ordinance in question seeks to prohibit are these:[8]

> "We believe in the essential wholesomeness of the human body and all its functions.
>
> "We believe in inculcating in all persons a desire to improve and perfect the body by natural living in the out-of-doors.
>
> "We believe that sunshine on the entire body are basic factors in maintaining radiant health and happiness.

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[8]*Sunshine and Health*, Vol. XVI, No. 7, July 1947, p. 30 (Official Publication of the American Sunbathing Association).

"We believe that the health of the nation will be immeasurably advanced through the wide acceptance of the principles and standards advocated by the American Sunbathing Association.

"We believe that presentation of the male and female figures in their entirety and completeness needs no apology or defense and that only in such an attitude of mind can we find true modesty."

Thus it is clear that there is here involved another minority belief which is entitled to constitutional protection. It is a belief the practice of which, unless in and of itself action which violates the clear and present danger rule, cannot constitutionally be proscribed.

B. The Statute, Proscribing as It Does Social Beliefs and Practices (as Distinguished From Ordinary Commercial Transactions) Is Subject to Searching Inquiry as to Its Constitutionality and Is Not Buttressed With the Ordinary Presumption of Validity.

This rule of constitutional construction was recognized in *United States v. Carolene Products Co.,* 304 U. S. 144, 153, and is now clearly the guide to legislation seeking to curtail the expression, by word or act, of social beliefs. (*Thomas v. Collins,* 323 U. S. 516, 530.)

Especially is this true where the legislation is directed against a particular minority or "victim" of special legislation, here—the Nudists. In the *Carolene Products* case, *supra*, this page, this court said:

"Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may *call for a correspondingly more searching judicial inquiry.*" (Italics added.)

And no showing was made by the state, to overcome the presumption of invalidity, that there was any danger clear, present, or otherwise of the taking place of any anti-social, immoral or other act that the state has the right to prevent.

C. Heterodox Social Practices of All Types Including the Practice of Nudism Are Entitled to Full Freedom of Expression Subject Only to the "Clear and Present Danger Rule."

In *West Virginia Board of Education v. Barnette,* 319 U. S. 624, the practice of the belief that the salute to the Flag violated one's conscience was upheld by this court as entitled to protection. So the requirement that all school children must partake in the ceremony was declared invalid as to Jehovah's Witnesses. Despite strong resentment on the part of the majority of the community (see Brief of the American Legion), this court recognized that the Board of Education had gone too far in curtailing the practice of belief.

There are, unquestionably, certain practices of belief that the state has the right to prevent—for example, polygamy. (*Cleveland v. United States,* 91 L. Ed. (Adv.) 1.) But such practices are admittedly anti-social in and of themselves.

The practice of Nudism, calling for the high morality that it does [People's Exhibit "A"], falls rather with the Flag Salute type of case rather than with the polygamy type of case. It should receive the same constitutional protection.

II.

The Practice of Nudism Itself, Without More, Does Not Constitute a Clear and Present Danger to Society.

A. Nudisim Is Neither Obscene, Immoral, Anti-social Nor Against the Public Peace or Good Order.

It must always be borne in mind that Nudism, as practiced and as shown by the record in this case, does not involve display, exhibitionism or the foisting of the belief upon those who are not in sympathy with it. It involves the practice of the belief away from public places and only in the presence of those who are in agreement, and it involves the commission of no immoral or otherwise illegal acts.

For this court to sustain the ordinance would be for this court to sustain the proposition that to view the human body is something inherently bad or obscene in and of itself. That this opinion is held by some will not be gainsaid by petitioners. (See dissenting opinions in *People v. Burke,* 243 App. Div. 83 and 267 N. Y. 571.) But the mere fact that there is disagreement as to a particular practice does not make the practice itself one which can be prohibited. (*Cf. West Virginia Board of Education v. Barnette,* 319 U. S. 624.)

The proper view is that the human body is something of art and beauty in and of itself the display of which, unless accompanied by acts otherwise immoral or in places where others might be offended, is not contrary to the ends of society. Thus in *Parmelee v. United States,* 113 F. (2) 729, 734 (App. D. C., 1940), the court said:

> "Nudity in art has long been recognized as the reverse of obscene. Art galleries and art catalogues

contain many nudes, ancient and modern. Even such a conservative source as Encyclopedia Britannica contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact."

Nor is the view that nudity itself is not immoral or obscene of strictly recent origin. As early as 1884 the New York court in *People v. Muller,* 96 N. Y. 408, said:

"It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting or sculpture as all known represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene simply on account of their nudity."

Certainly the human body itself should not be in any less favored position than reproductions of it.

The principles and standards of the Nudists themselves clearly show that immorality and obscenity are the very things which they desire to eliminate. Thus the record in the case at bar shows [Tr. 78; R. .....] the following:

"One man (a Nudist on the premises at which petitioners were arrested), who had on a G-strap, said 'do you know anything about Nudism? It has given us great health benefits; it has helped my wife considerably.' I (the arresting officer) then asked him if he did not object to the children being in the nude or seeing adults in the nude. He said that he did not object to it and knew that there were so many other children who were having trouble because of sex curiosity, but that the children who were brought up in the belief of Nudism did not have any of that trouble and that their morals were of the highest caliber."

And the official platform of the Nudists bears out the same conclusion. It is:[9]

"Our goal is the healthy mind in the healthy body. This is not only a creed but a way of life. Sun, light and air are vital conditions of human well-being. We believe these elements are insufficiently used in present-day life, to the detriment of physical and moral health. For the purpose of health and recreation and for the conditioning of man to his world we offer a new social practice, based on the known wholesome value of exposure to these elements and in the spirit of naturalness, cheerfulness, and cleanness of body and mind that they symbolize. We aim to make the fullest possible use of sun, light and air by a program of exercise and life in the open in such a way as will result in the maximum physical and mental benefit.

"We believe in the essential wholesomeness of the human body, and all its functions. We therefore regard the body neither as an object of shame nor as a subject for levity or erotic exploitation. Any attitude or behavior inconsistent with this view is contrary to the whole spirit of the society and has no place among us.

"The practice of our physical culture tends toward simplicity and integrity in all ways. We counsel for our members the sane and hygienic life. We reserve the right to impose abstinence from stimulants and intoxicants at our meetings and on our grounds.

"We invite to our membership persons of character of all ages and both sexes. Our purposes are not exclusively physical or cultural or esthetic but rather a normal union of all these. We make no tests of

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[9]*Sunshine and Health*, Vol. XVI, No. 7, July 1947, p. 24.

politics, religion or opinion provided that these are so held as not to obscure the purposes of the Movement. It is intended that the Movement shall be representative of the whole social order."

A practice of the belief of the ideals above set forth cannot be condemned *ipso facto* as immoral or obscene. The very creed, or "way of life," sets forth the antithesis of immorality or obscenity.

III.

The Ordinance Is Arbitrary, Indefinite, Vague and Uncertain.

A. The Difference Between Criminality and Non-criminality Under the Statute Is a Tiny Piece of Cloth.

The "legal litmus paper"[10] under the ordinance is a few inches of cloth. Thus if at the premises the persons were to wear a so-called "G-strap" [Defendant's Exhibit 1], the petitioners would not have been arrested. For the statute reads that what is prohibited is a place where persons of the opposite sex may be together in the nude. From a Biblical standpoint it may be said, in general, that the fig-leaf has denoted the difference between what is nude and what is not nude. From the standpoint of the protection of society from the immorality or obscenity which the ordinance purportedly is designed to reach, such a distinction is without merit. In fact, quite the contrary is the result to be achieved by the ordinance. It is well known that a far greater erotic or sensual impulse may be derived from a view of the draped form than from the completely nude form. The sensual or erotic desires arise

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[10]Justice Holmes in *Abrams v. United States*, 250 U. S. 616, 629.

to a greater degree when there is the suggestion of nudity rather than when the completely nude form is shown. Persons who capitalize on this human trait (circus side show operators, burlesque dancers, etc.) take full advantage of it. And even those who are responsible for the design of ladies' clothes take pains to emphasize by suggestion and "daringness" the features of the female body which differentiate it from the male. It is this very suggestion of immorality or obscenity which the petitioners and other Nudists seek to eradicate.

If the word "nude" in the ordinance were to be given any other interpretation than complete nakedness, it would then perforce fall of its own weight within the meaning of *Lanzetta v. New Jersey,* 306 U. S. 451, because it would be too vague a meaning, there being nothing in the ordinance to define how much covering must be on the person before it be considered that he is not in the nude.

But there is no need to belabor the definition of the word. It seems clear that what the statute aims at preventing is a place where persons of the opposite sex may be together *completely* naked. If they are not thus completely "in the skin," so to speak, it is not a violation of the law.

It thus follows that the statute is arbitrary on its face and as enforced because the dividing line denoting criminality is an insignificant piece of material.

B. The Word "Nude" Is Not Defined in the Ordinance Thus Rendering the Ordinance Invalid for Vagueness and Uncertainty.

This court has many times pointed out that a criminal statute which in its terms is so vague that ordinary men would differ as to its meaning violates due process of law.[11] Certainly if the word "gangster" without definition renders a statute void for uncertainty and vagueness,[12] so also should the word "nude" undefined.

A search of the law books gives little help.

The word is defined in Webster's New International Dictionary as follows:

> "Nude (nud), a. (L. Nudus. See Naked:)
>
> 1. Law Naked: without consideration or, in Roman and Civil Law, without a cause (see cause, 3); as a nude contract. (*cf.* naked contract. See naked, 7b); a nude pact. See NUDUM PACTUM.
>
> 2. Bare; mere; naked, manifest. Obs.
>
> 3. Bare; naked; devoid of covering, as hair, investment, or the like; barren; as, a nude bud, room, or mountain.
>
> 4. Naked; unclothed; as a nude person or statue.
>
> Syn.—See Naked.
>
> Nude. n. 1. Paint. & Sculp. A nude or undraped figure.
>
> 2. With the. The undraped human figure, or a representation of it in art; also, the state of being nude."

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[11]*Connolly v. General Construction Co.*, 269 U. S. 385, 391-393; *Lanzetta v. New Jersey*, 306 U. S. 451, 458.

[12]*Lanzetta v. New Jersey, supra*, note 11.

Bouvier's Law Dictionary defines the word as follows:

> "Nude. Naked. Figuratively, this word is now applied to various subjects. Nude matter is a bare allegation of a thing done, without any evidence of it."

The most that can be gathered from these definitions is that nude means completely naked—without any clothing. But is that what is meant by the ordinance? It is impossible to tell. For example, shoes are certainly a part of one's ordinary clothing. And so a person reading the statute and interpreting it to mean simply completely without clothing or entirely naked, could feel—and rightly so—that he would not be violating the statute by operating a place where persons went around without clothing except for shoes. Similarly, would it be a violation of the statute for petitioners to operate a place where the women were required to wear brassiers but nothing around their groins? The law abiding citizen can get no answer to this problem from reading the ordinance. Or is the ordinance violated if the women are required to wear so-called "G-straps" but are not required to cover their breasts?

Thus we find here a criminal statute which has all the vice that was condemned in the *Lanzetta* case.

The Appellate Department interpreted the subdivision here in question as entirely separate from the rest of the ordinance. But even if we look to the rest of the ordinance in an effort to find a definition of the word, no information is gleaned. The closest to a definition is found in Subdivision (A):

> "*Definitions:* 'Nudist camp or colony' shall mean: any place where three or more persons, not all members of the same family, congregate, assemble or associate for the purpose of exposing their bodies in the nude in the presence of others or of each other."

This "definition" helps not at all, for what is meant by "nude"? Is a person who has on a pair of shoes and socks nude? Certainly his whole body is not exposed "in the nude." Does the ordinance condemn exposing one's toes to other persons? Or does the ordinance condemn exposing one's sexual organs to others? Nowhere in the ordinance can the answers to these questions be found. If the ordinance is intended to prevent the exposing of the sexual organs, it could very well have said so and so inform the citizenry ahead of time as to what is prohibited.

The ordinance not having the standard of certainty required, conviction under it violates due process.

C. The Ordinance Is Arbitrary and Unreasonable Because It Outlaws Ordinary Family Relationships and Conduct.

The Appellate Department of the Superior Court has ruled that Subdivision (H) of Section 47.50 is entirely severable from the other subdivisions of the ordinance [Tr. 103; R. .....]. Accordingly a reading of Subdivision (H) leads to the conclusion that a husband who provides a household for his wife and 2-month-old child is guilty of violating the ordinance if the husband and wife be unclothed in the presence of each other and in the presence of their naked child. Clearly such restriction on personal habits exceeds the ends to which society can go to protect itself.

And in matters concerning the exercise of freedom of expression this court will judge the constitutionality of a statute on its face in the light of the abuses that may arise from it. (*Thornhill v. Alabama*, 310 U. S. 88, 97.)

D. There Is No Reasonable Basis for Prohibiting Three or More Persons From Practicing Nudism in the Presence of Each Other While at the Same Time Permitting Two Persons to Practice It in Each Other's Presence.

Under the ordinance, had petitioners operated the exact same type of an establishment but only permitted two persons at a time of opposite sexes to view each other in the nude, they would not have committed a crime. If the practice of Nudism has the deleterious effect on society claimed, it would have the same effect whether many persons are in the nude in each other's presence or whether but two are. In fact, it is more likely that when but two are thus allowed in each other's presence immoral or anti-social acts will take place than when many persons are involved.

Conclusion.

It is therefore respectfully requested that the Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles be granted and that the judgment below be reversed.

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APPENDIX A.

"Sec. 47.50. NUDIST CAMPS AND COLONIES.*

(A) *Definitions.*

1. 'Nudist Camp or Colony' shall mean: any place where three or more persons, not all members of the same family, congregate, assemble or associate for the purpose of exposing their bodies in the nude in the presence of others or of each other.

(B) It shall be unlawful for any person to operate, manage or conduct any nudist camp or colony without a permit therefor from the Board of Police Commissioners. No permit shall be issued for any such camp or colony unless persons of opposite sexes there congregating or assembling or otherwise participating in the activities thereof are so effectively segregated by adequate structural barriers that persons of one sex can neither commingle with nor view persons of the opposite sex in the nude. Any permit issued in violation hereof shall be void.

(C) Each application for a permit hereunder shall be made upon a form prepared by the Board setting forth the proposed location and such other information as the Board may require; it must be signed by the person to be in responsible charge or management of the premises, and, if the applicant be a corporation, partnership or association, by each of the responsible officers thereof.

The Board may thereupon make such investigation as it deems necessary, and if it shall determine that adequate provision has not been made for the segregation of the sexes, or that the applicant or his associates are not fit and proper persons to conduct such a camp or colony, or that the proposed location is not suitable or appropriate or that the granting of a permit would not comport with public welfare or morals, then the application must be denied.

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*Defendant's Exhibit 3.

(D) Any permit issued hereunder may be suspended or revoked by the Board upon any ground hereinabove mentioned as ground for denial thereof, or in any of the following cases:

1. If the complete segregation of the sexes has not been continuously and effectively maintained;
2. If indecent, immoral or illegal acts or practices have been committed, with or without the consent of the permittee;
3. If such camp or colony has been conducted in an otherwise illegal manner.

(E) Each application for a permit shall be accompanied by a fee in the sum of $150.00. Each permit shall expire upon the first day of October next after its issuance, unless sooner revoked or suspended. Each application for a renewal thereof shall be accompanied by a fee of $50.00. Upon any application for a renewal, the power of the Board to grant or deny shall be the same as in the case of an original application.

(F) Each permit shall be effective only at the location named thereon. Such location may be changed only by the Board upon application accompanied by a special fee therefor in the amount of $25.00.

(G) It shall be unlawful for any permittee or any other person for a fee or charge to permit or offer to permit the public or any spectator to view the participants or any of them in any nudist camp or colony.

(H) It shall be unlawful for any person to operate, manage, or conduct any camp, colony, or other place of resort, wherein three or more persons not all of the same sex are permitted or allowed to commingle in the nude; or wherein persons are permitted or allowed to view persons of the opposite sex in the nude."

APPENDIX B.

"FRATERNITY ELYSIA

"REGISTRATION FORM*

'Whereas, the pressure and speed of modern life is very great, and the results of this pressure are seen in the great number of breakdowns, nervous, mental and physical, whereas, marked curiosity and distorted attitudes toward sex and the human body constitute a large factor in those breakdowns, and whereas, it has been conclusively proven that there is an inherent reaction against the restraining influence of clothes—and further, that a periodic release seems best to be obtained in an environment in which people may dispense with clothing and that such a practice is beneficial therapeutically and better fits the individual to carry on as an efficient, well adjusted member of society—be it resolved that we, holding these beliefs and findings in common, band ourselves together as the FRATERNITY ELYSIA, for the interchange of social and cultural values and the permanent establishment of some retreat, wherein we may be free from the prying eyes and prejudices of the public at large and may enjoy the health giving sun and air freely and without restriction.'

"(Preamble, Constitution and By-Laws, Fraternity Elysia)

"I, Bond, Robert & Anna, the undersigned, are fully aware of the principles and practices of the Fraternity Elysia, and believe them to be wholesome and beneficial, mentally, morally, and physically, and so, herewith, make application for admittance to the grounds and precincts frequented by its members. In the event, such permission

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*People's Exhibit A.

is accorded me and I avail myself of it, I do herewith pledge myself not to jeopardize, through any act, acts or speech of mine, the position and security of any member, and/or members of the group there present or of any of the members of the Fraternity either while on the grounds or in any other place, and I further pledge myself to such conduct as shall not be offensive to any of the members of the Fraternity.

"Signed this 31st day of Aug. 1946. Age..... Married X Divorced..... Single..... Children, Name—Age No

"Signature X Bob and Anna Bond Address 7149 No. Bedford, L. A.

"Occupation Salesman Nationality Am Education Grammar

"Note: In cases where one member of a couple wishes to visit alone, express permission in writing must be given by husband or wife. Both signatures on this form will be sufficient.

"This will not be considered as an application for membership in the Fraternity until the signer has visited its resort and the desire for affiliation is mutual. There is no obligation on the part of the Fraternity to confer nor on the part of the signer to accept membership.

"IMPORTANT: Cameras are not to be exposed without the express permission of the director, and all cameras are to be unloaded before leaving the premises. All negatives are to remain in the possession of the Fraternity. No photographs may be taken excepting under these conditions."

LURA D. GLASSEY and HENRY L. [illegible],

[illegible]

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 260

LURA D. GLASSEY and HENRY L. BROENING,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Statement of the Case.

The petitioners were charged with violation of subsection (H) of a Los Angeles ordinance (Section 47.50, Los Angeles Municipal Code), which declares it to be unlawful for any person to *operate, manage or conduct* a camp or other place of resort wherein "three or more *persons not all of the same sex* are permitted or allowed to commingle in the nude; or wherein *persons are permitted or allowed to view persons of the opposite sex in the nude.*" (Emphasis ours.)

The subsection does not prohibit persons who are cultists of nudism from commingling; neither does it prohibit members of the same family from associating together in the nude. Nor yet does it make it unlawful to operate a camp where persons, whether members of a cult or not, commingle or expose themselves provided the sexes be segregated.

The subsection involved is a penal provision, separate and apart from the remainder of the section which provides for the licensing of nudist camps. Subsection (H) applies to persons conducting a licensed camp to the same extent as it applies to persons conducting an unlicensed camp.

It does not appear by the record that any of the persons who attended the camp conducted by petitioners were members of the nudist cult or believed in any of the tenets of nudism. Neither does it appear that the petitioners, defendants and appellants below, ever at any time urged that the ordinance interfered with any social, religious or political belief entertained by them. The matter now urged by petitioners came before the Appellate Court (and before such court only) solely by reason of the argument of *amicus curiae.* [R. 60.]

The statement in the petition to this court (Petition page 2) that the issue was decided adversely to petitioners "over their argument," lacks much of being entirely correct. The fact that the petitioners were operating such a camp as is proscribed by the ordinance is concluded by the decision of the state court.

Questions of Law Involved.

The questions of law involved are:

(1) Do the provisions of the First Amendment, as incorporated in the Fourteenth Amendment, prohibit a state from enacting and enforcing under the police power a law aimed at preventing conduct having a reasonable tendency to induce immorality?

(2) Assuming that the First Amendment protects cultisms other than religious and political cults, does the First Amendment operate to prevent the state from enacting laws applicable to those who engage in conducting camps where persons devoted to cults, other than religious or political, congregate?

Before the questions of law above mentioned are answered, two other questions must be considered:

(a) May one who has not raised in the state courts his defense of the alleged infringement of his rights under the First Amendment be heard to urge that point in this court?

(b) May one who has not at any time during the course of proceedings in the state courts urged his belief in the cult of nudism, urge the invalidity of a law regulating nudity, assuming for the purpose of argument only that a person believing in the tenets of such cult would have a right to a hearing here?

Summary of the Argument.

I.

THE RECORD DOES NOT PRESENT A CASE WHICH, UNDER THE PRACTICE OF THE COURT, REQUIRES A DECISION UPON THE FEDERAL QUESTION.

II.

THE SECTION INVOLVED DOES NOT INTERFERE WITH THE PRACTICE OF NUDISM.

III.

THE PROHIBITION OF ACTS WHICH ARE OFFENSIVE TO MORAL CONCEPTS IS WITHIN THE POLICE POWER OF THE STATE, AND SUCH PROHIBITION DOES NOT OFFEND AMENDMENTS ONE OR FOURTEEN OF THE FEDERAL CONSTITUTION.

IV.

RELATION OF THE "CLEAR AND PRESENT DANGER DOCTRINE" TO THE ORDINANCE DISCUSSED.

V.

CONCLUSION.

ARGUMENT.

I.

The Record Does Not Present a Case Which, Under the Practice of the Court, Requires a Decision Upon the Federal Question.

This court in *The Rescue Army v. The Municipal Court of the City of Los Angeles,* .... U. S. ...., 91 L. Ed. (Adv. Sheets) 1221, has again emphasized the fact that, although jurisdiction be shown, it is the policy of the court to refrain from deciding a federal question unless it appears from examination of the record that the question was squarely presented.

If, for the purpose of argument only, it be assumed that all social ideologies come within the protection of the First Amendment, it nowhere appears that the petitioners, or either of them, are members of any cult subscribing to the principles or beliefs set out in the registration form (Petition, Appendix B., Appendix p. 3). They were found guilty of running a camp such as is prohibited by the ordinance. Many persons who are not, and never have been, consumptives, conduct resorts for persons affected with tuberculosis.

As shown by the certificate of the Appellate Court [R. 60] the appellants did not urge before that court that enforcement of the ordinance trenched upon any religious, political or social belief. It does not appear in the record that any such claim was made in the trial court. The first and only claim to that effect was made

by *amicus curiae,* now counsel for petitioners, at the time of argument in the Appellate Court. True, the Appellate Court does certify that the federal question was considered by the court. We have never been under the impression that, even though a court saw fit to consider a question raised only by friends of the court, such decision was one which gave rise to a hearing before a higher court. In fact, we have been so naive as to think the function of *amicus curiae* was to support some contention of one party or the other to an action, and that it was not the duty or the privilege of friends of the court to introduce new questions, in the substance of which neither party to the case was interested.

It is now well settled that no person may require a court to decide the validity of a law unless it appears that the law, if valid, infringes in some way upon his liberties.

Hanneford v. Silas Mason Co., 300 U. S. 577, 583;

Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 558;

Massachusetts v. Mellon, 262 U. S. 447, 488;

Utah Power & Light Co. v. Pfost, 286 U. S. 165, 186.

In view of the fact that petitioners have not claimed in any state court that the ordinance under which they were prosecuted infringed upon their right to practice their social beliefs, this case appears to come well within the doctrine of the *Rescue Army* case, *supra.*

When and if there comes before this court a case in which a law prohibits the practice of nudism by a believer in such social ideology, ample opportunity to examine into the relation of such concept of social behavior to the police power of the state will exist. Certainly one who is charged only with the act of running a camp where commingling of the sexes in the nude was permitted, cannot expect this court to determine whether the rights of believers in nudism are infringed by the ordinance.

Furthermore, no decision upon the merits of nudism and its relation to the First and Fourteenth Amendments is called for when, under the ordinance involved, practice of the tenets of nudism is not prohibited to the devotees of such cult, except to the extent that the ordinance requires that those who practice such tenets in camps must forego the exposure of themselves in the nude to persons of the opposite sex.

II.

The Section Involved Does Not Interfere With the Practice of Nudism.

Although we feel that application of the principle enunciated in the *Rescue Army* case will result in denial of *certiorari*, we nevertheless shall discuss the other questions explicit in the record for such assistance as such discussion may render to the court.

No rule is better established than the rule that this court accepts the construction placed upon a state law by the courts of the state. The state court has held that subsection (H) of Section 47.50, Los Angeles Municipal Code, is severable from the remainder of the section which subjects nudist camps to regulation [R. 51.] However, it is proper to examine the remainder of the section to determine whether the City has attempted to prohibit that which petitioners designate as a "social belief." Such examination discloses not only no attempt to prohibit the practice of such social concept but discloses an intent to protect the exercise of such beliefs by licensing resorts in which such beliefs may be practiced. The ordinance not only provides regulations which tend to discourage and prohibit immoral practices, but requires that such places be so conducted that they are not offensive to the social standards of the vicinity.

There may come a time in the history of this nation when the social standards revert back to the time of Adam and Eve before their fall, but until such time comes it will be within the power of the legislature to require that persons of the opposite sex, when in the presence of each other, be clothed in at least a fig leaf or its modern equivalent, or, as in the case at bar, pro-

hibit the operation of camps where persons of the opposite sex may resort together in the nude.

We digress to point out that petitioners wholly misinterpret the subsection when, at page 19 of their petition, they insist that if a husband and wife appear unclothed in the presence of their two months old child the husband would be guilty of violating the subsection involved. The subsection does not purport to cover actions in the home by any person, whether or not he be a convert to nudism. The ordinance is limited to camps, colonies and resorts, and subsection (H) punishes only those operating such places under conditions proscribed. The words used do not connote residences of members of the same family. Assuming, for the purpose of argument only, the correctness of petitioners' construction, and further assuming that as to persons in such family relation the ordinance would be invalid, it does not follow that the ordinance is invalid as applied to these petitioners, who make no claim to being members of the same family.

Although a law may be so broad as to embrace within its field of prohibition acts not within the police power to prohibit, such fact does not render the law invalid as to those properly within its field of effectiveness.

Smiley v. Kansas, 196 U. S. 447, 457.

It is a familiar rule that a thing may be within the letter of the law and yet not within the statute because not within its spirit, nor within the intention of its lawmakers.

Church of Holy Trinity v. U. S., 143 U. S. 457.

General terms will be so construed as to avoid injustice, oppression or absurd consequences.

U. S. v. Kirby, 74 U. S. (7 Wall.) 482.

In *Lake Shore & M. S. R. Co. v. Ohio,* 173 U. S. 285, this court pointed out that it is always possible for an ingenious mind to suggest extreme cases under which the application of any particular judicial decision could be held to be inconsistent with the Constitution, and said that when such situations presented themselves it could be determined whether they are controlled by the decision previously rendered.

When and if the State of California attempts to enforce the ordinance involved in this action against a father who appears nude, or who, with his wife, appears nude in the presence of his two months old child, it will be time for this court to consider whether the ordinance unduly interferes with the homelife of our citizens. And when and if the City of Los Angeles adopts an ordinance, the result of the enforcement of which will deprive some believer in nudism as a social concept from practicing the tenets of his belief., it may become proper for this court to give ear to the plaint of such person.

So long as the ordinance before this court does not prohibit the practice of nudism, certainly persons who are engaged in the operation of camps for the benefit of such cultists, at a charge of so much per day or week [R. 33], cannot raise in this court the question of validity of the ordinance as it affects persons who are devotees of the cult of nudism.

III.

The Prohibition of Acts Which Are Offensive to Moral Concepts Is Within the Police Power of the State, and Such Prohibition Does Not Offend Amendments One or Fourteen of the Federal Constitution.

The position of petitioners appears to be that a social concept, whatever its nature, comes within the protection of the First Amendment, and the indulgence in or practice of such social concept is entitled to the same protection afforded by such Amendment to the practice of religion. We do not understand petitioners to urge that nudism is practiced as a means of worship of some Supreme Being. To say that their theory is at least novel is an understatement.

It has been often said that for the purpose of determining the meaning and application of a statute the court would attempt to ascertain what the legislature intended to accomplish by a given statute. Likewise it is proper to consider what our forebears intended to protect by the First Amendment. In the instant case, inasmuch as no question of free speech is involved, we may confine our inquiries to what object was sought to be accomplished by the provision for freedom of worship.

However limited may be the right of courts to take judicial notice of facts, certainly this court can take judicial notice of the fact that at the time of the colonization of America there was an established English church and that certain colonies were established as a refuge from conformance to such State religion. Likewise the court can take notice of the fact that nations other than England had State religions and that persons not con-

forming to such religions were persecuted. Many of the original colonists came to the new continent to enjoy "religious freedom" but, sad to say, too often their idea was not religious freedom but freedom to worship in their own manner and to compel others to conform to their form of worship. This backdrop reflects the light upon the First Amendment so that we can see that the citizens of the new nation intended that there could never be a State religion which would prevent them from worshipping God in such manner as they saw fit. It was never intended that the First Amendment protect the practice of social ideologies which offended public morals or decency. However strong our imagination may be, we find it impossible to imagine that our forefathers, who would have been shocked at the sight of a woman in a modern evening gown, to say nothing of one on the streets in bra and shorts or on the beach in a modern bathing suit, ever intended the First Amendment to be used as a shield behind which to carry on nudism.

This court has held that laws which prohibited plurality of wives were valid, even as to those who practiced such custom as a religious duty and belief.

Reynolds v. U. S., 98 U. S. 145;
Davis v. Beason, 133 U. S. 333;
Church of Jesus Christ of Latter Day Saints v. U. S., 245 U. S. 366.

Certainly the power to enact prohibitive measures aimed at protecting the public morals is no less with respect to social ideologies than it is with respect to religion.

That the protection of public morals is a function within the police power of the state is so well settled as to need no citation of authorities in support thereof.

IV.

Relation of the "Clear and Present Danger Doctrine" to the Ordinance Discussed.

Petitioners urge that the practice of nudism itself, without more, does not constitute a clear and present danger to society (Petition p. 12). We have found no cases in which courts have attempted to apply such doctrine to ordinances aimed at the protection of public morals and decency.

In view of the fact that during argument of the *Rescue Army* and *Gospel Army* cases a member of this court indicated that it could not be seen wherein the clear and present danger doctrine was applicable to these cases, we are inclined to think that such doctrine has no application to the instant case. For that reason it is with some considerable hesitancy that we risk trespassing upon the time of the court by discussing the point. However, because of prevalent uncertainty in the minds of the judiciary as well as in the minds of the legal fraternity concerning the scope of the doctrine, we feel impelled to discuss the subject briefly.

The question which arises is: What constitutes a clear and present danger?

Using a physical illustration, we will suppose that a number of children were playing on the street and a dog affected with rabies appeared on the street two blocks away. Was there a clear and present danger that some of the children might be attacked by the

dog? Or would the possibility that some alert citizen might kill the dog before it reached the children defeat the clear and present danger doctrine until the dog got within a few feet of them? Or would the fortuitous possibility that such dog might turn aside or pass the children in its path, thus doing them no harm, impel the conclusion that there was no clear and present danger until and unless the dog was in the act of biting a person?

Applying the same reasoning to freedom of speech and press as it may apply to national safety, and considering the fact that the writer of this brief several years ago sat at the counsel table when opposing counsel, representing a certain alleged political party, which we here leave unnamed, said in argument to the court that such political party intended to overthrow the government of the United States, peacefully if possible, by force of arms if necessary, we wonder whether the doctrine ceases to be operative when the legislature, from facts before it, has reasonable grounds to believe that, unless certain action is taken, jeopardy to the peace of the state will result, or must it wait to act until violence occurs and the streets run red with blood?

With respect to ordinances aimed at protection of public morals, and in particular the ordinance under discussion, if the doctrine applies, does it mean that, when it appears to the legislature that continuance of the operation of camps where persons of the opposite sex associate in the nude will undermine public morals, the legislature may prohibit the operation of such camps, or does it mean

that the hand of the legislature is stayed until such time as, because of the operation of such camps, fornication and licentiousness runs riot in the vicinity?

Although Mr. Justice Frankfurter in a concurring opinion in *Pennekamp v. Florida,* 328 U. S. 331, made what appears to us to be a clear and realistic approach to the proper application of the phrase "clear and present danger," such construction of the phrase has as yet failed to receive the blessing of the court.

Each of the words "clear" and "present" have various meanings which render any definite conclusion as to the meaning of the phrase "clear and present danger" impossible in the absence of some more definite judicial expression concerning the sense in which the term is used. Suffice it to say that the founders of this nation, in our opinion, never intended the First Amendment to become the sarcophagus of common decency, or an impregnable wall which would prohibit a legislature from enacting legislation in protection of the public morals, unless the inescapable result of failure to enact such law would result in the total destruction of the social system.

Neither does the clear and present danger doctrine require the legislature to stay its hand until conditions become such that, in the absence of legislation, wholesale and uncontrolled immorality is the rule rather than the exception in the various communities of the nation.

V.

Conclusion.

By reason of the fact that the record neither discloses the tenets of nudism nor discloses that the petitioners were believers in any cultism, and for the further reason that the ordinance does not prohibit the practice of nudism, but on the contrary tends to protect such practices under healthful, moral surroundings, the petition in this case should be denied.

Respectfully submitted,

RAY L. CHESEBRO,
DONALD M. REDWINE,
JOHN L. BLAND,

Attorneys for Respondent, The People of the State of California.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.....

LURA D. GLASSEY and HENRY L. BROENING,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Because of new matter presented by respondent's answer to petition, petitioners respectfully request the court's permission to file this, their reply thereto.

In answering the contentions of respondent, petitioners will reply in the order of presentation adopted by respondent—making references to the pages of respondent's answer.[1]

Statement of the Case.

Respondent states [Ans. 2] "the subsection does not prohibit persons who are cultists of nudism from commingling" and then says that it is not unlawful to operate a camp "*provided* the sexes are segregated"! (Italics added.) What respondents are attempting to say is not

[1]References to Respondent's Answer will be as follows: [Ans.] followed by the page number in brackets. Thus: [Ans. 1].

clear. Certainly a camp where the sexes are segregated is no place where nudism may be practiced. Such a concept negates the very precept of nudism that the human body is not a thing of shame or of mystery but rather that true modesty is found when both the male and female forms are presented in their entirety.[2]

What is meant by the wording of subsection (h) (Petition, Appendix A, p. 2) that "it shall be unlawful for any person to operate, manage, or conduct any camp, colony, or other place of resort, wherein three or more persons not all of the same sex are permitted or allowed to commingle in the nude; or wherein persons are permitted or allowed to view persons of the opposite sex in the nude" if not that a place where nudism may be practiced is prohibited and that petitioners are made criminals because of their beliefs in and the practice of nudism?

Respondent would have this court believe [Ans. 2] that none of those who attended the camp were nudists or believed in the tenets of nudism. A mere glance at the record demonstrates the contrary. The whole record is replete with examples of the persons practicing nudism and with their professions of their belief in its tenets [R. 33, 34, 35, 36]. The very registration form (Petition, Appendix B) that all persons who entered the camp had to sign [R. 33] shows that those who attended were or desired to be members of the Fraternity Elysia and that

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[2] *Sunshine and Health*, September 1947, page 24.

they believed in the tenets of nudism. True, the *arresting officers* lied when they signed the form [R. 33]. But there is nothing to even hint that the others at the camp were equally false in their declarations.

Respondent's own evidence shows that at the time of the arrest one of the persons at the camp said [R. 34]:

> "Do you know anything about nudism? It has given us great health benefits, it has helped my wife considerably . . . there were so many other children who were having trouble because of sex curiosity, but . . . the children who were brought up in the belief in nudism did not have any of that trouble . . . their morals were of the highest caliber."

Respondent's witness reported petitioner Glassey as having told him about Fraternity Elysia [R. 35] (see Appendix B to Petition for an exposition of its precepts); further that she told him that the Fraternity ran the camp [R. 35]; and that she told him about the benefits of nudism and that all members of the Fraternity believed in it [R. 35].

Certainly sincerity of belief and practice cannot be gainsaid in this case.

ANSWER TO RESPONDENT'S ARGUMENT.

I.

The Federal Question Is Squarely Before This Court.

A.

Petitioners Are Nudists and Believe in the Tenets of Nudism.

Respondent asserts to this court that the record fails to show that either of the petitioners was a believer in nudism or a subscriber to the beliefs set out in the registration form (Petition, Appendix B) [Ans. 5]. As indicated above, even a summary glance at the record demolishes this fantastic claim. Petitioner Glassey testified [R. 36]: "I am a member of Fraternity Elysia." The registration form (Petition, Appendix B) says:

> "We, holding these beliefs and findings (concerning nudism as set forth preceding this statement in the form) in common, band ourselves together as the Fraternity Elysia, for the interchange of social and cultural values and the permanent establishment of some retreat, wherein we may be free from the prying eyes and prejudices of the public at large and may enjoy the health giving sun and air freely and without restriction."

As to petitioner Broening, the record shows that the Fraternity Elysia ran the camp and that each member had as much say about it as anyone else [R. 35]. Thus Broening's statement that "he was *one* of the managers" (italics added) [R. 36] shows that he, as a member of the Fraternity Elysia, had a say as to the running of the camp. And it shows that as a member of the Fraternity he believed in its precepts.

Further, from the very nature of the belief in nudism, even aside from what the record affirmatively shows, it is unreasonable to compare the running of a nudist camp with the conducting of a resort for consumptives. In the nature of things people don't conduct nudist camps unless they are nudists and believe in its principles. Such an occurrence just doesn't happen.

B.

The Constitutional Question Was Properly and Timely Raised.

The record shows that petitioners from the very beginning of the proceedings asserted the unconstitutionality of the ordinance. In the trial court they objected to any evidence being introduced on the ground that the ordinance was unconstitutional being indefinite, vague and uncertain [R. 32, 33] and that the complaint stated no facts to constitute a public offense [R. 33]. If the ordinance on which a complaint is founded is unconstitutional, no public offense is stated.[3]

Later, and in time according to California law,[4] petitioners moved the trial court in arrest of judgment on the ground that no public offense was stated [R. 24].

Again, in the argument before the Appellate Department petitioners urged that the section was unconstitutional because it is ambiguous and uncertain and because it is an unlawful restraint on individual personal liberty [R. 50, 60].

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[3] *De Jonge v. Oregon*, 299 U. S. 353;

[4] California Penal Code, Sections 1450, 1452, 1461a.

The above, with nothing more, shows sufficiently and succinctly how and that the precise constitutional issues urged here were presented to both state courts. For, as this court has indicated:[5]

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

But this record shows more. It shows that the lower court considered and passed upon all the above arguments [R. 60] and in addition that it considered and passed upon the argument of *amicus curiae* that the ordinance violated the First and Fourteenth Amendments to the United States Constitution [R. 60]. The mere fact that *amicus curiae* happened to *mention* by number the Federal Constitutional provisions does not detract from the fact that petitioners relied on these same provisions and urged their rights under them. What were petitioners' arguments that the ordinance is vague and uncertain [R. 32, 33] and ambiguous [R. 60] and that it violated their individual personal liberty [R. 60] if not claims under the First and Fourteenth Amendments to the United States Constitution? The very decision of the lower court [R. 51] shows that it considered and passed on these claims. And the point

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[5]*New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67.

is bolstered by that court's certificate, as to what was before it, considered and passed upon [R. 60].

And even further, petitioners in petitioning for a rehearing specifically named the Federal Constitutional provisions by number [R. 55, 56, 57].

Such is the state of the record. It clearly comes within this court's rulings in *Whitney v. California*,[6] *Honeyman v. Hanan*[7] and *New York ex rel. Bryant v. Zimmerman*.[8]

Before leaving the subject, it should be pointed out that in California an unconstitutional ordinance is no law at all;[9] that the question of the failure of the complaint to charge a public offense may be raised at any time during the progress of the case;[10] and that unconstitutionality may be raised even after affirmance on appeal by way of habeas corpus.[11] Thus here, even accepting respondent's assertion as to when petitioners themselves raised the question, it is clear that they did so and named the Federal Constitutional provisions by number in their petition for rehearing before the lower court [R. 55, 56]. And it is equally clear that that court considered and passed on their arguments [R. 60].

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[6]274 U. S. 357, 361, 362.

[7]300 U. S. 14.

[8]*Supra*, Note 5.

[9]*Pacific Indemnity Co. v. Myers*, 211 Cal. 635, 292 Pac. 1084; *Robison v. Payne*, 20 Cal. App. (2d) 103, 66 P. (2d) 710.

[10]*People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. McKean*, 76 Cal. App. 114, 243 Pac. 898; *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681.

[11]*In re Bell*, 19 Cal. (2d) 488, 122 P. (2d) 22.

In any event, the courts in California will consider and pass on the constitutionality of an ordinance though raised and argued by *amicus curiae*.[12]

This case is a far cry from *Rescue Army v. Municipal Court*,[13] relied upon by respondent [Ans. 5]. In that case the ordinance involved was a highly technical one whose interpretation was confusedly interrelated with many other sections and wherein the decision of the state court was intimately connected with the decision in *Gospel Army v. City of Los Angeles*,[14] which appeal this court dismissed because of lack of finality of the state court judgment. In giving its reasons for declining to decide the constitutionality of the ordinance in the *Rescue Army* case this court said (pp. 1236, 1237):

> "In the first place, the constitutional issues come to us in highly abstract form. Although raised technically in the separate proceeding in prohibition, they arise substantially as upon demurrer to the charges against Murdock in the criminal proceeding. The record presents only bare allegations that he was charged criminally with violating pp. 44.09 (a), 44.09 (b) and 44.12, and that those sections are unconstitutional, on various assignments, as applied to his alleged solicitations. We are therefore without benefit of the precision which would be afforded by proof of conduct made upon trial. Moreover, we do not have the benefit on this record of even the literal text of the charges. Indeed, the summarized statement of the pleadings leaves us in doubt whether there were only two, or, on the other hand, three dis-

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[12] *Pacific Indemnity Co. v. Myers, supra,* Note 9.

[13] 91 L. Ed. (Adv.) 1221.

[14] 91 L. Ed. (Adv.) 1241.

tinct offenses charged. . . . In these circumstances we are unwilling to undertake clarifying the ambiguity."

No such problem is present in the case at bar. The constitutional issues do not come to this court "in highly abstract form." They come to this court with the "precision afforded by proof of conduct made upon trial." And whereas in the *Rescue Army* case this court did not even have "the literal text of the charges," no such defirmity is present here. The precise charge is a part of the record [R. 1, 2] wherein is set forth the complaint itself. There is no question here as there was in the *Rescue Army* case as to how many offenses were charged. It is clear from a reading of the complaint [R. 1, 2] that there is but one and one only. There is no ambiguity for this court to resolve nor any matter of ambiguity as to state procedure or state law.

There is before this court a record, crystal clear, presenting the constitutional issue, raised by the petitioners from the very beginning of the proceedings.

While respondent's statement that one may not challenge the constitutionality of an ordinance unless he is adversely affected thereby [Ans. 6] is true as a general proposition, the statement adds nothing to respondent's argument because the petitioners easily come within the rule. It is precisely they whose liberties are being imfringed upon by the ordinance. It is precisely they who are being prevented from the practice of their belief in nudism. Respondent's argument that petitioners merely ran a camp where nudism was practiced and that they were arrested because of that fact and not because they practiced nudism is a clever bit of legal sophistry. It is asking this court

to be blind to the true import of the ordinance as applied to these petitioners. It is to be remembered that "the constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name."[15] If respondent is correct, a method has been discovered wherein bigoted public officials can with impunity prevent the exercise of constitutional liberties. All that need be done is to prohibit the operation of a place where these liberties may be practiced and then to criminally prosecute one for conducting such a place. For example, under this theory the legislature may make it illegal to conduct a place wherein Catholicism is taught. Then, by arresting the person who conducted such establishment, respondent would have this court say that there is no infringement on the exercise of religion because the arrest was made not for worshipping but simply for conducting a place where the worshipping may be done. Such toying with and evasion of fundamental constitutional rights will not be permitted by this court.[16]

Aside from this and at the risk of appearing redundant, petitioners again point out that they themselves are nudists and were attempting to practice their belief and were arrested therefor [R. 33, 35, 36].

And finally we should be mindful that the ordinance is a curtailment on the exercise of individual freedom of expression. In judging its constitutionality on its face, therefore, this court will view it in the light of the abuses that may, from the language of the ordinance, arise from it.[17]

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[15]*Cummings v. Missouri,* 4 Wall. (U. S.) 277, 332.

[16]*Smith v. Allwright,* 321 U. S. 649; *Lane v. Wilson,* 307 U. S. 268.

[17]*Thornhill v. Alabama,* 310 U. S. 88, 97.

II.

The Section Involved Does Interfere With the Practice of Nudism.

Respondent's assertion that the "practice of the tenets of nudism is not prohibited (by the ordinance in question) to the devotees of such cult, *except to the extent that the ordinance requires that those who practice such tenets in camps must forego the exposure of themselves in the nude to persons of the opposite sex*" (italics added) [Ans. 7] contains within itself its own refutation.

The section quite clearly prevents the operation of any place where nudism may be practiced (Petition, Appendix A). This is an *absolute prohibition* and is far more restrictive than the statutes held invalid on their face in *Thomas v. Collins,*[18] where a permit was given as a matter of course, or in *Hague v. C. I. O.,*[19] where the administrative office had discretion to issue the permit. By this section the entire right is outlawed.

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[18]323 U. S. 516.

[19]307 U. S. 496.

III.

The Acts Prohibited by the Ordinance in Question Are Within the Protection of the First and Fourteenth Amendments to the Federal Constitution and Come Within the "Clear and Present Danger" Rule.

These matters have already been presented to this court by petitioners [Pet. 8-15] and so will not be repeated here.

Respondent apparently urges, however [Ans. 11], that because the argument advanced by petitioners is a novel one, this court should decline to consider it. Quite the contrary; this court does not decline to hear a matter because of the novelty of the question. In fact, that is one of the very reasons as to why this court will grant certiorari (Rule 38(5)(a) of this court). The beauty of the Constitution is its ability to keep abreast of and to cope with new situations as they arise.

Such is the case at bar.

The writ should therefore issue.

Respectfully submitted,

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